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IN THE

Supreme Court of the United States

October Term, 1943

No. 288

Swiss National Insurance Company, Ltd., a Corporation of Basle, Switzerland, *Petitioner*,

against

Leo T. Crowley, as Alien Property Custodian, and W. A. Julian, as Treasurer of the United States, *Respondents*.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

Frederic R. Coudert,
Alexis C. Coudert,
Counsel for Petitioner,
No. 2 Rector Street,
New York, N. Y.

Press of Byron S. Adams, Washington, D. C.

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IN THE

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October Term, 1943

No. ——

SWISS NATIONAL INSURANCE COMPANY, LTD., a Corporation of Basle, Switzerland, *Petitioner*,

against

LEO T. CROWLEY, as ALIEN PROPERTY CUSTODIAN, and W. A. JULIAN, as TREASURER OF THE UNITED STATES, *Respondents.*

PETITION FOR WRIT OF CERTIORARI.

May It Please the Court:

The petition of SWISS NATIONAL INSURANCE COMPANY, Ltd., a corporation duly organized and existing under the laws of Switzerland, respectfully shows to this Honorable Court:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This is an application by Swiss National Insurance Company, Ltd., for a writ of certiorari to review a final judgment of the United States Court of Appeals for the Dis-

trict of Columbia, entered on the 24th day of May, 1943. The said judgment affirmed the judgment of the District Court of the United States for the District of Columbia, which awarded judgment to the defendants-respondents upon their counterclaim in the amount of $110,580.06, the claim asserted in the bill of complaint having previously been settled by the parties.

Petitioner is a Swiss corporation. In 1910 is established an office in New York for the transaction of fire insurance and reinsurance business in this country. Petitioner was an enemy within the definition contained in Section 2 of the Trading with the Enemy Act of October 6, 1917 (40 Stat. 411, 50 U. S. C. A.—R. 153), since it also did business in Germany. Upon our entry into the war on April 6, 1917, President Wilson issued a proclamation authorizing German insurance companies to continue in business under certain conditions (R. 25-26). Petitioner, although not a German corporation, apparently considered itself among those benefited by this Proclamation and it continued to do business without restriction for a number of months. On November 27, 1917, the Secretary of the Treasury, acting pursuant to Section 5 of the Trading with the Enemy Act, issued to petitioner a license authorizing continuance of its insurance business under certain specified conditions (R. 59-60). Pursuant to this and a subsequent superseding license issued October 6, 1918 (R. 60-63), petitioner continued its business until November 15, 1918, when the license was revoked (R. 63-64), together with all licenses previously issued to other enemy insurance companies. Shortly thereafter petitioner's assets in the United States were taken over by the Alien Property Custodian.

On January 6, 1922, petitioner commenced an action in the Supreme Court of the District of Columbia to recover the properties seized by the Custodian, asserting that it was no longer an enemy because the war had ended and it had ceased doing business in Germany and that the Act of

June 5, 1920, 41 Stat. 977, amending the Trading with the Enemy Act, entitled it to the return of its assets. The trial court dismissed the complaint and the Court of Appeals and this Court affirmed. *Swiss National Insurance Co.* v. *Miller,* 53 App. D. C. 173, 289 Fed. 571, affirmed, 267 U. S. 42.

On March 3, 1924, before the decision of this Court cited above, petitioner filed a claim, under Section 9 of the Trading with the Enemy Act, for the return of all profits earned by it from April 6, 1917 to November 15, 1918, when its license was revoked. On June 15, 1925, President Coolidge, pursuant to the opinion of Attorney General Sargent (R. 67-72), allowed the claim. Thereafter the sum of $419,-230.97 was returned to petitioner as profits earned during the license period and as interest or earnings realized by the Alien Property Custodian during his retention of the funds.

In 1930, pursuant to the Settlement of War Claims Act of 1928, 45 Stat. 254, a sum claimed to be 80 per cent of petitioner's assest remaining in the United States Government's possession was returned to the company. The present action was instituted by petitioner for an accounting as to certain reservations for taxes and other purposes which had been set up by the Government officials in arriving at the amount to be returned to petitioner under the Settlement of War Claims Act. The defendants named in the bill (R. 2-7) pleaded a counterclaim (R. 12-25) which sought recovery of 20 per cent of the amount paid to petitioner in 1926 as profits earned during the license period—April 6, 1917, to November 18, 1918—the defendant's contention being that the return of the profits was without authority of law.

After settlement by the parties of the claim asserted in the bill of complaint, the trial court awarded judgment for respondents on their counterclaim, holding that the President acted under a mistake of law in returning the profits to petitioner and that the United States was entitled to re-

covery thereof. The Court of Appeals affirmed with an opinion (R. 185-188) in which it discusses and rejects the contentions advanced by petitioner.

B.

JURISDICTION OF THIS COURT.

Section 240 (a) of the Judicial Code, 28 U. S. C. § 347(a), confers upon this Court jurisdiction to review by certiorari judgments of the United States Court of Appeals for the District of Columbia.

The judgment of which petitioner seeks review was entered on May 24, 1943 (R. 189).

C.

QUESTIONS PRESENTED.

(1) Whether the decision of President Coolidge, dated June 15, 1925, allowing petitioner's claim for the return of profits earned by it from April 6, 1917, to November 18, 1918, is subject to judicial review in the present proceeding; and

(2) Whether respondents are entitled, under the circumstances of this case, to recover funds which originally belonged to petitioner, were later sequestered by the Alien Property Custodian, and were finally restored to petitioner pursuant to the President's order of June 15, 1925.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The Court below, in denying finality to a Presidential determination made pursuant to Section 9(a) of the Trading with the Enemy Act, erroneously decided a question of substance relating to the construction or application of a statute of the United States which has not been, but should

be, settled by this Court. This question, among others, was presented in *United States* v. *Rodiek,* 117 F. (2d) 588, in which this Court granted certiorari, 314 U. S. 597, and affirmed the judgment, without opinion, the Court being equally divided 315 U. S. 783. In that case the Circuit Court of Appeals for the Second Circuit discussed the question at some length but failed to decide it, holding that the claimant had reopened the whole matter by attempting to obtain an additional allowance by way of private bill in the Senate.

(2) The Court below, in holding that the action of the President in allowing a claim for the return of property seized by the Alien Property Custodian is subject to judicial review, failed to give proper effect to certain decisions of this Court believed by petitioner to be applicable herein. Petitioner refers to the following decisions, among others:

Great Northern Ry. v. *United States,* 277 U. S. 172;
Butte, A. & P. Ry. v. *United States,* 290 U. S. 127;
Jackson v. *Irving Trust Co.,* 311 U. S. 494;
United States v. *Morgan,* 313 U. S. 409;
Perkins v. *Lukens Steel Co.,* 310 U. S. 113;
United States v. *Babcock,* 250 U. S. 328.

(3) In holding that respondents were entitled to the return of the funds restored to petitioner under the Presidential order of June 15, 1925, the Court below failed to give effect to the principle that the suit for restitution, upon which respondents counterclaim was based, is equitable in nature and will lie only where the person against whom relief is sought has been unjustly enriched. This principle has been applied by this Court in many cases, including the following:

Atlantic Coast Line v. *Florida,* 295 U. S. 301;
Badeau v. *United States,* 130 U. S. 439;
United States v. *Royer,* 268 U. S. 394.

WHEREFORE, petitioner prays that a writ of certiorari be issued out of and under the seal of this Court, directed to

the United States Court of Appeals for the District of Columbia, commanding it to certify and send to this Court for review and determination a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket No. 8398, Swiss National Insurance Company, Ltd., a corporation of *Basle, Switzerland, Appellant* v. *Leo T. Crowley,* as Alien Property Custodian, and W. A. Julian, as Treasurer of the United States, Appellees, and that the said judgment may be reversed by this Court, and that petitioner may have such other and further relief as to this Court may seem proper.

SWISS NATIONAL INSURANCE COMPANY, LTD.,
Petitioner,

FREDERIC R. COUDERT,
ALEXIS C. COUDERT,
No. 2 Rector Street,
New York, N. Y.
Counsel for Petitioner,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943.

No. ———.

SWISS NATIONAL INSURANCE COMPANY, LTD., a Corporation of Basle, Switzerland, *Petitioner,*

against

LEO T. CROWLIY, as Alien Property Custodian, and W. A. JULIAN, as Treasurer of the United States, *Respondents..*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinion of the United States Court of Appeals for the District of Columbia is not yet reported in App. D. C., nor in F. (2d), and is found at pages 185-188 of the Record.

JURISDICTION.

Section 240(a) of the Judicial Code, 28 U. S. C. § 347(a), gives this Court jurisdiction to review by certiorari the judgment of the Court below.

STATEMENT OF THE CASE.

The case was presented to the District Court on a stipulation setting forth the material facts (R. 53-58).

Petitioner, a Swiss corporation, in 1910 established an office in the City of New York. Upon the outbreak of war in April 1917, President Wilson issued a proclamation (R. 25-26) authorizing German insurance companies to continue operation under specified conditions. Whether petitioner mistakenly availed itself of this permission, as the Court below suggests (R. 185), or whether it continued to operate on the theory that it was not an enemy, is not clear from the Record. In any event, by virtue of Section 2(a) of the Trading with the Enemy Act, enacted October 6, 1917, petitioner became an enemy alien, and on November 27, 1917, the Secretary of the Treasury issued petitioner a revocable license to continue its insurance business (R. 59-60). This was superseded by a license dated October 6, 1918 (R. 60-63). Petitioner continued to operate its United States branch until November 18, 1918, when the last license issued to it was revoked (R. 63-64). Shortly thereafter all property of petitioner located in the United States was seized by the Alien Property Custodian.

On March 3, 1924, petitioner filed with the Alien Property Custodian, pursuant to Section 9(a) of the Trading with the Enemy Act, a claim for the return to it of an amount equal to the profits earned by it from April 6, 1917, to November 18, 1918. On June 15, 1925, President Coolidge (R. 66), upon the opinion of Attorney General Sargent (R. 67-72), allowed the claim and directed that the amount of such profits be ascertained and paid to petitioner (R. 56).

The opinion of the Attorney General took the position that petitioner operated under Governmental license from April 6, 1917, to November 18, 1918, and that as a consequence petitioner was not an enemy during the license period and was entitled, by reason of Section 9(a) of the Trading with the Enemy Act, to the return of profits earned

during that period. This opinion is in accord with the conclusions reached in a number of similar cases presented to three Attorneys General and three Presidents (R. 56-57).

Thereafter an audit was made to determine the amount of such profits with interest and income earned thereon, and the sum of $419,230.97 was received by petitioner from the Custodian.

After enactment of the Settlement of War Claims Act of 1928, 45 Stat. 254, petitioner received from the Custodian an amount supposed to be 80 per cent of the residue of its seized property. Believing that this latter amount had not been properly computed, petitioner commenced the present action against the Custodian and the Treasurer of the United States for an accounting. The defendants, now replaced by their successors in office, answered and counterclaimed for the recovery of 20 per cent of the amount returned to petitioner as profits pursuant to the Presidential order of 1925, contending that the order was improper (R. 12-25). The claim set forth in the bill of complaint (R. 2-7) was settled, and the trial court awarded judgment (R. 151) to respondents on their counterclaim, with an opinion (R. 148-150) stating that the return to petitioner of the profits was unlawful and was subject to judicial correction.

SPECIFICATION OF ERRORS TO BE URGED.

The United States Court of Appeals for the District of Columbia erred:

(1) In holding that the action of President Coolidge in allowing petitioner's claim to the return of profits earned between April 6, 1917, and November 18, 1918, was reviewable in the present suit;

(2) In determining that it is not inequitable to require petitioner to pay back the amount returned to it by virtue of the President's order of June 15, 1925, and that respondents' counterclaim, demanding such repayment, is maintainable.

BRIEF OF THE ARGUMENT.

POINT I. Even if the President's allowance of petitioner's claim to the return of the profits was erroneous, his decision was final and not subject to judicial review. This contention rests upon the provisions of the Trading with the Enemy Act, read in the light of the general principles applicable to judicial review of executive and administrative action.

POINT II. The basis of recovery of moneys claimed to be improperly or unlawfully paid is unjust enrichment; and although the return to petitioner of the profits may have been made without authority of law, petitioner is fairly entitled to retain the funds in equity and good conscience, inasmuch as beneficial ownership has at all times received in petitioner.

POINT I.

Even if the President's allowance of petitioner's claim to the return of the profits was erroneous, his decision was final and not subject to judicial review. This contention rests upon the provisions of the Trading with the Enemy Act, read in the light of the general principles applicable to judicial review of executive and administrative action.

Petitioner's claim for the return of the profits earned by it during the license period was presented and allowed pursuant to Section 9(a) of the Trading with the Enemy Act (50 U. S. C. A., appendix) which provides that "Any person not an enemy or ally of enemy" claiming an interest in property held by the Custodian may apply to the President, who "may order the payment * * * to said claimant of the money or other property so held by the Alien Property Custodian * * *"

Since the right to make a claim is expressly limited to one not an "enemy or ally of enemy" and the President may order payment only to such a claimant, it is plain that

the President may not allow a claim without making a determination as to the non-enemy status of the claimant. In the present case the President must have determined that petitioner's status was that of a non-enemy in so far as the profits were concerned. Such a determination, we contend, involved the exercise of quasi-judicial powers and is not subject to judicial review.

That an executive or administrative determination of this nature may not be scrutinized by the courts is an established principle of administrative law, applied in many decisions of this Court. For example, in *Butte, A. & P. Ry.* v. *United States*, 290 U. S. 127, this Court held that an award by the Interstate Commerce Commission to a carrier was final and not subject to reconsideration by the courts. The decision in *Great Northern Ry.* v. *United States*, 277 U. S. 172, is similar. A number of recent decisions of this Court indicate a strong reluctance to permit judicial interference with executive or administrative action.

> *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113;
> *United States* v. *Bush & Co.*, 310 U. S. 371;
> *Z. & F. Assets Realization Corp.* v. *Hull*, 311 U. S. 470;
> *United States* v. *Morgan*, 313 U. S. 409;
> *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U. S. 134.

None of these decisions is entirely in point. The question in each case is essentially one of statutory construction: the inquiry is whether Congress intended to authorize judicial review of the particular executive or administrative determination.

There can be no doubt that Congress had power to ascribe complete finality to a Presidential allowance under Section 9(a). *United States* v. *Babcock*, 250 U. S. 328. We believe that the intent of Congress to do so is clearly apparent from a consideration of the language of the Act. Under subsection (a) of Section 9, a claimant may apply to the President for relief, and, if the President does not act fav-

orably within 60 days, may institute a suit in equity in the appropriate court; or the claimant may in the first instance proceed by suit in equity. Thus, while there is an express provision for judicial reconsideration of a Presidential refusal to order repayment, there is no such provision for review of a Presidential allowance. A clearer inference of Congressional intention would be difficult to discover.

Other provisions lend support to this view. Section 9(c) provides, in part:

> "The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof."

The following language, contained in Section 12, also indicates that court order and Presidential allowance were to be of equal force and effect:

> "*Provided, however,* that on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court."

It is thus perfectly apparent that Congress intended a Presidential order under Section 9 to be no less authoritative or conclusive than a judicial decree; they were to be "alternative methods of decision of equal weight and finality". (*United States* v. *Rodiek*, 117 F. (2d) 588, 591; affirmed by an equally divided court, 315 U. S. 783.) This Court has recently held that a judicial decree in favor of a non-enemy claimant who elected to proceed by suit under

Section 9, instead of by application to the President, could not be set aside years later on the ground that the claimant was in fact an enemy at the time his claim was judicially allowed. *Jackson* v. *Irving Trust Co.*, 311 U. S. 494. We believe that under the statutory provisions above referred to a Presidential allowance under Section 9 is no more subject to collateral attack than a judicial decision.

The argument we make here has been before the courts on several occasions. See *Cummings* v. *Societe Suisse*, 66 App. D. C. 121, 85 F. (2d) 287; *Societe Suisse* v. *Cummings*, 69 App. D. C. 154, 99 F. (2d), 387; cert. denied, 306 U. S. 631; *Isenberg* v. *Biddle*, 75 App. D. C. 100, 125 F. (2d) 741; *United States* v. *Rodiek*, 177 F. (2d) 588, affirmed by an equally divided court, 315 U. S. 783. In each instance, the court refused to consider the contention on its merits, holding that the plaintiff had himself, by bringing suit, attacked the allowance previously made and had thus invited the court to re-examine all the questions involved in the original claim. It was on that basis that the Court of Appeals for the District of Columbia, in *Isenberg* v. *Biddle, supra*, distinguished *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, referred to above.

In the present case petitioner has in no way attacked the order of the President under Section 9 directing the return to it of profits earned during the license period, nor has it questioned the amount received by it pursuant thereto. The complaint herein sought rather a recomputation of the amount awarded petitioner under the Settlement of War Claims Act of 1928, an entirely different matter unrelated to the question determined by the President under Section 9 of the Trading with the Enemy Act. Thus it cannot be said that petitioner has opened the door to reconsideration of the President's order, and this case squarely presents the question whether a Presidential allowance under Section 9 is subject to review by the courts.

POINT II.

The basis of recovery of moneys claimed to be improperly or unlawfully paid is unjust enrichment; and although the return to petitioner of the profits may have been made without authority of law, petitioner is fairly entitled to retain the funds in equity and good conscience, inasmuch as beneficial ownership has at all times remained in petitioner.

The respondents' counterclaim rests not upon any statutory basis but upon the equitable principles of restitution. It cannot be doubted that money paid by mistake can be recovered only if the person from whom recovery is sought has been unjustly enriched.

The considerations underlying the cause of action for restitution were explored and analyzed by Mr. Justice Cardozo in *Atlantic Coast Line* v. *Florida*, 295 U. S. 301. In that case, after an order of the Interstate Commerce Commission authorizing an increase in rates had been declared invalid by this Court, certain shippers sought restitution from the railroad of the difference between the old rates and the higher rates collected pursuant to the invalid administrative order. This Court held that, in equity and conscience, the railroad was entitled to retain the full amounts collected.

Therefore, the question here is whether petitioner would be unjustly enriched by the retention of the amount received by it under the President's order of June 15, 1925. We believe that a brief consideration of the underlying facts and circumstances leads to the conclusion that petitioner should not be required to return the funds in question.

It is important to note that this is not a case where ordinary public funds of the United States, such as taxes collected by it, have been improperly paid out of the Treasury. In such cases the United States is ordinarily entitled to restitution. *Wisconsin Central R. R.* v. *United States*, 164 U. S. 190

Here the funds in question originally belonged to petitioner. International law and usage, to which the United States has always sedulously adhered and which are "part of our law" (The Paquete Havana, 175 U. S. 677, 700), have long proscribed the confiscation of private enemy property.

United States v. *Percheman*, 7 Peters 51, 87;
United States v. *Klein*, 13 Wallace 128, 137;
Moore, Digest of International Law, Volume 7, pp. 312-313.

In the instant case the Court below, on the authority of *Cummings* v. *Deutsche Bank*, 300 U. S. 115, held that a seizure of enemy property under the provisions of the Trading With the Enemy Act divested the enemy of every interest therein and that such property "when taken by the Custodian became the property of the United States absolutely." (R. 188.) In other words, a seizure of property under the Trading With the Enemy Act, as interpreted by the Supreme Court in that case, amounted to confiscation.

This Court has in the past, in many instances, expressed its readiness to reconsider and reverse former rulings where it developed that such rulings were clearly erroneous. We respectfully urge that the decision of the Court in *Cummings* v. *Deutsche Bank, supra,* should be reexamined by this Court in the light of certain enactments by Congress which were not brought to the attention of the Court in the briefs filed in that case nor considered by the Court in its opinion.

The Trading With the Enemy Act became law on October 6th, 1917, six months after we entered the First World War. On July 1st, 1918, Congress directed as follows:

> "All taxes heretofore or hereafter lawfully assessed by any body politic against money or other property held by the Alien Property Custodian, shall be paid out of such money or other property, and if that be insufficient shall be charged thereto and paid out of any other moneys or properties required from the same enemy or ally of enemy." (40 Stat. 646.)

Section 24 (a) of the Trading With the Enemy Act, added by the Act of March 4, 1923, 42 Stat. 1516, provides:

> "The Alien Property Custodian is authorized to pay all taxes (including special assessments), heretofore or hereafter lawfully assessed by any body politic against any money or other property held by him or by the Treasurer of the United States under this Act, and to pay the necessary expenses incurred by him or by any depository for him in securing the possession, collection, or control of any such money or other property, or in protecting or administering same. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed or in respect of which such expenses are incurred, or (if such money or other property is insufficient) out of any other money or property held for the same person, notwithstanding the fact that a claim may have been filed or suit instituted under this Act."

Obviously confiscation of enemy property would vest full title, equitable and legal, in the United States. But the above statutes are entirely inconsistent with the theory that Congress intended to confiscate enemy property, for under our law property of the United States is not taxed by the Federal Government, nor is it ordinarily subject to taxation by State or local authorities.

Neither the Executive nor Congress has ever manifested any intention to depart from the principle that private enemy property is not subject to confiscation, and these statutes relating to taxes, together with much other evidence, show clearly that enemy property was not confiscated but was merely placed in the custody of the Alien Property Custodian, its final distribution to be determined by the Congress.

The statement of the Secretary of State of February 8th, 1917, made under the President's authority almost two months prior to the entry of the United States into the First World War, described as "entirely unfounded" all fears by foreign subjects that in the event of the war their

property would be seized. Every Act of Congress bearing upon the subject voices the rejection of any policy of confiscation. The very title of the Settlement of War Claims Act of 1928, 45 Stat. 254, speaks of the "ultimate return of all property held by the Alien Property Custodian." Many of the provisions of that Act recognize, in unmistakable terms, the continuing interest of the former enemies in the 20 per cent of the property which was retained by the Government for certain specified purposes. For example, in Section 10 (Section 25 of the Trading With the Enemy Act), the Secretary of the Treasury is directed to issue to the Custodian certain interest-bearing certificates as evidence of the investment by the latter of funds in his possession, and Section 25 (e) (2) refers to the former enemies as "owners of the money invested." The Act also provided that no property should be returned unless the "person entitled thereto" should file his consent to "postponement" of the return of the 20 per cent (Section 14, constituting Section 9 (m) of the Trading With the Enemy Act). And the return of the 20 per cent is referred to as "temporarily postponed" (Section 25 (a) (2) of the Trading With the Enemy Act).

Similarly, the drastic Public Resolution No. 53 of June 27, 1934, 48 Stat. 1267, provides, not for confiscation, but for a postponement of return.

In the light of these enactments by the Congress of the United States, we submit that it is clear that property seized under the Trading With the Enemy Act was not confiscated but remained the property of the enemy owner. On no other theory can the action of Congress directing the Alien Property Custodian to pay Federal, State and Municipal taxes be explained. And on no other theory than that of continued beneficial ownership in the enemy can we explain the express direction of Congress to the Alien Property Custodian to pay the taxes out of other property taken over from the same enemy whenever the property against which the tax was assessed was insufficient.

How, then, can it be said that petitioner was unjustly enriched by the return to it of money to which it was entitled, which return was at most a premature performance by the United States of an obligation imposed by International law and repeatedly recognized by Congress? The court below summarily dismisses the contention by stating that petitioner "obtained moneys of the United States to which it was not entitled under existing law." (R. 187.) But this entirely fails to meet the issue; the fact that "existing law" may not have justified the return does not prove that petitioner was unjustly enriched. The courts have often refused to compel the return of public funds improperly paid out where they have felt that the payee was fairly entitled to retain what he had received.

> *Badeau* v. *United States*, 130 U. S. 439;
> *United States* v. *Royer*, 268 U. S. 394.

Thus it is no answer at all to say merely that Congress had not yet provided for return of the funds in question.

> "The question no longer is whether the law would put him in possession of the money if the transaction were a new one. The question is whether the law will take it out of his possession after he has been able to collect it."
>
> (*Atlantic Coast Line* v. *Florida*, 295 U. S. 301, 310.)

We submit that petitioner was fairly entitled to keep the moneys returned to it under President Coolidge's order and that the counterclaim should therefore have been dismissed.

CONCLUSION.

Under the principles contended for by respondents and adopted by the courts below, funds paid over to a claimant pursuant to Presidential allowance under Section 9 of the Trading with the Enemy Act, are at any time subject to being reclaimed by the Government, whether, as here, many years after payment, or, if the Government desires, immedi-

ately following the President's order. That Congress intended no such result seems apparent from the language of the statute. It is equally plain that it is inequitable to require this petitioner to return funds which it received many years ago in complete good faith and to which it was deemed entitled by the Attorney General, the Alien Property Custodian and the President, whose decision was reached after full consideration by those Government officials whom he had chosen to deal with such questions.

The questions presented by the petition are important and are likely to arise frequently in the administration of the Trading with the Enemy Act during and after the present war. We submit that the decision of the court below is erroneous and that this is a case which calls for the exercise by this Court of its supervisory powers.

Respectfully submitted,

FREDERIC R. COUDERT,
ALEXIS C. COUDERT,
No. 2 Rector Street,
New York, N. Y.,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 288

SWISS NATIONAL INSURANCE COMPANY, LTD., A CORPORATION OF BASLE, SWITZERLAND, PETITIONER,

v.

LEO T. CROWLEY, AS ALIEN PROPERTY CUSTODIAN, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court of the United States for the District of Columbia granting defendants' motion for judgment on their counterclaim is not reported but will be found at R. 148. The affirming opinion of the United States Court of Appeals for the District of Columbia is reported at 136 F. (2d) 265 and will be found at R. 185. The issues raised by the complaint were not

presented to the trial court or the Court of Appeals and are not here involved.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on May 24, 1943 (R. 189). The petition for a writ of certiorari was filed on August 24, 1943. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

In 1921 the petitioner filed a suit under Section 9 of the Trading with the Enemy Act for the return of all its assets seized as enemy property by the Alien Property Custodian in 1918. This Court in 1925 decided that the petitioner was an enemy and not entitled to any return (267 U. S. 42). In 1924 the petitioner filed a notice of claim under Section 9 for return of profits made while operating under license, a claim embraced within that asserted in the litigation, and the President, acting upon a recommendation of the Attorney General in 1925 in ignorance of the decision of this Court, ordered the return of the profits, which were thereupon paid to the petitioner. In 1931 the petitioner instituted this, a second suit under Section 9 for a further return on its claim under the Settlement of War Claims Act of 1928, and the Government counterclaimed for restitution of 20%

of the funds illegally returned in contravention of the final decision of this Court in the first suit.

The case presents the following question:

Whether in a second suit by an enemy under Section 9 of the Trading with the Enemy Act for the return of additional moneys, the United States can recover on a counterclaim moneys previously returned by an order of the President under Section 9 which disregarded a final judgment in the first suit and was induced by mistake of law and fact.

STATUTE INVOLVED

The applicable portions of the Trading with the Enemy Act, as amended, are set forth in the Appendix, pp. 15–18.

STATEMENT

The petitioner, an insurance company incorporated under the laws of Switzerland, opened a branch office in New York in 1910 (R. 54). After our entry into World War I on April 6, 1917, the Company continued to do business (R. 55). On October 6, 1917, the Trading with the Enemy Act (40 Stat. 411) became a law and, as the petitioner carried on business in Germany, it was an "enemy" as defined in the Act. Nevertheless, it was permitted to operate under licenses until November 18, 1918, when, after revocation of its license, all its property and assets in the United States were duly demanded and seized by the Alien Property Custodian. (R. 54–55.)

On November 28, 1921, the petitioner instituted an action under Section 9 of the Trading with the Enemy Act in the then Supreme Court of the District of Columbia against the Alien Property Custodian and the Treasurer of the United States (*Swiss National Insurance Company* v. *Miller*), praying for the return of *all* its seized property, including "all income and accruals and such other further property as may be in the hands of the Alien Property Custodian or the Treasurer of the United States" (R. 166–168). Upon defendants' motion, that action was dismissed (R. 171), and the trial court's decree was affirmed by the Court of Appeals of the District of Columbia (289 Fed. 571; R. 171) and by this Court (267 U. S. 42; R. 177). It was thus judicially determined that the petitioner was an enemy, and was not entitled to the return of any of its property.

On March 3, 1924, while the case was pending in this Court, the petitioner filed notice of claim with the Alien Property Custodian under Section 9 for the return of the profits earned while operating under the licenses (R. 55). These profits were an integral part of the property seized, and their return was included in the relief sought in the suit then pending. This Court affirmed the decision of the Court of Appeals on February 2, 1925 (R. 177). Nevertheless, on June 13, 1925, the Attorney General recommended to the President the allowance of the claim, stating, *inter alia* (R. 66, 67):

> * * * suit has been instituted by this company petitioning the release of all of its property on the ground that it was a corporation of Switzerland, which suit is *now pending* in the Supreme Court of the United States, * * * [Emphasis supplied.]

No mention was made of the prior decisions of any of the three courts.

The letter also stated that there was "pending litigation in this case" and recommended the securing of a release discharging the United States from further liability for the profits upon payment of the claim (R. 72). The President approved the recommendation on June 15, 1925 (R. 66), and there was returned to the claimant the sum of $331,612.10 plus interest in the amount of $87,-618.87, representing all the profits earned while operating during the period of the licenses (R. 56).

On March 10, 1928, the Settlement of War Claims Act (45 Stat. 254, 270) was enacted. It amended the Trading with the Enemy Act by providing in effect that former enemy corporations, substantially owned by Germans, could receive back 80% of their seized property, if they signed consents to the retention by the Custodian of 20%. The petitioner filed such a claim and consent and 80% of the residue of its property was returned (R. 58).

The complaint in the present action was filed on September 2, 1931 (R. 2), and sought an accounting of various sums reserved by the Custodian. With their answer, the respondents filed

a counterclaim praying restitution of 20% of the profits returned by the allowance of June 15, 1925, together with various items of income (R. 12–24). The theory of the counterclaim was that though the entire return to the petitioner in 1925 was erroneous and illegal, the petitioner would have been entitled to the return of 80% of the profits after March 10, 1928, by the Settlement of War Claims Act and therefore restitution of only 20% of the profits was sought. The issues raised by the counterclaim (R. 12) and the reply thereto (R. 42) were submitted on a stipulation of facts (R. 53–145) upon which the trial court granted defendants' motion for judgment on the pleadings (R. 146, 151).

ARGUMENT

Petitioner does not deny that the decision of this Court in *Swiss National Insurance Co.* v. *Miller,* 267 U. S. 42, in 1925 was *res judicata* as to its right to the return of the amounts in question here,[1] or that the President's approval of the

[1] The complaint in the case decided in 1925 expressly sought the return of all petitioner's property in the hands of the Alien Property Custodian, with the "increase thereof" and the "income therefrom," and thus reached the funds subsequently recovered under the President's order. Although it does not appear that petitioner made in that case the argument presented to the Attorney General and to the President, no reason appears why it could not have done so. It is well established that a decision in an action between the same parties on the same claim or demand is binding "not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other

payment to it, in ignorance of that decision, was based upon a mistake of law. Its contentions are (1) that the President's allowance of its claim is absolutely final, not to be set aside by the courts even on a showing of mistake, and (2) that, in any event, it is entitled in equity and good conscience to keep the money inasmuch as the decisions of this Court holding that a seizure by the Alien Property Custodian completely divests enemies of all interest in the property seized were erroneous and should be overruled.

1. It is settled doctrine that, whatever be the rule as between private individuals, the United States is entitled to recover public funds paid out under a mistake of law or of fact. *United States* v. *Burchard,* 125 U. S. 176; *United States* v. *Barlow,* 132 U. S. 271, 281–282; *Wisconsin Central Railroad* v. *United States,* 164 U. S. 190, 211–212; *United States* v. *Wurts,* 303 U. S. 414, 415; *Heidt* v. *United States,* 56 F. (2d) 559 (C. C. A. 5), certiorari denied, 287 U. S. 601; *United States* v. *Bentley,* 107 F. (2d) 382 (C. C. A. 2); Restatement of Restitution, Sec. 46. The lower federal courts have uniformly held that this prin-

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admissible matter which might have been offered for that purpose." *Cromwell* v. *County of Sac*, 94 U. S. 351, 352–353; *New Orleans* v. *Citizens' Bank*, 167 U. S. 371, 396; *Southern Pacific R. Co.* v. *United States*, 168 U. S. 1, 48; *Myers* v. *International Trust Company*, 263 U. S. 64, 70–71; *United States* v. *Moser*, 266 U. S. 236, 241; *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 503.

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ciple applies to property returned by the Alien Property Custodian. *Cummings* v. *Societe Suisse,* 85 F. (2d) 287, 99 F. (2d) 387 (App. D. C.), certiorari denied, 306 U. S. 631; *Isenberg* v. *Biddle,* 125 F. (2d) 741 (App. D. C.); *United States* v. *Rodiek,* 117 F. (2d) 588 (C. C. A. 2), affirmed, by an equally divided court, 315 U. S. 783; *United States* v. *W. A. Pflueger,* Civil Action No. 2356, N. D. Ill., decided February 4, 1941; *United States* v. *H. H. Pflueger,* Civil Action No. 21726-R., N. D. Cal., decided September 27, 1941.

The petitioner has suggested no valid reason why this general principle should not apply. The Trading with the Enemy Act does not give to the President's determination any greater finality than would normally be accorded the decisions of any other official on questions of disbursement. The purpose of the provision allowing the payment of claims upon a determination by the President or his delegate of the claimant's status and preseizure ownership of the property was to make it unnecessary for all claimants to resort to the courts to recover their property. The achievement of that purpose did not require that the administrative determination, if favorable to the claimant, should be forever thereafter binding upon the Government, even though it be subsequently found to have been based on a mistake of law or fact or even fraud and thus to sanction recovery specifically forbidden by the Congress. In the absence of any indication to the contrary

in the statute there would seem to be no more reason for ascribing finality to an erroneous Presidential determination based on a mistake of law that a claim under Section 9 should be paid than to an erroneous determination by the Postmaster General based upon a mistake of law as to the pay for carrying the mails (*Wisconsin Central Railroad* v. *United States,* 164 U. S. 190) or to an erroneous determination by the Commissioner of Internal Revenue based upon a mistake of law that a refund of federal taxes should be paid. *Eg., United States* v. *Wurts,* 303 U. S. 414.

The Act contains neither express provision nor any statutory language from which an intention to make the Presidential determination final may be inferred. To the contrary, the express reservation to dissatisfied persons of a right to institute an independent action in the courts, and the power given the President to delegate authority to make the determination (Section 5 (a))[2] forcibly indicate that Congress intended the President's order to be, not a quasi judicial determination, but comparable to the act of a disbursing officer exercising executive functions.

[2] The power to make the determination was frequently delegated by the President to such persons as the Attorney General, the Alien Property Custodian, the Managing Director of the Office of the Alien Property Custodian, the Assistant Managing Director, the General Counsel of the Alien Property Custodian, and the Director of Finance and Accounts. See, for examples, Executive Orders 3281 of June 11, 1920; 4572–A of January 27, 1927; 4862 of April 23, 1928; 5113–A of May 14, 1929; and 6018 of February 7, 1933.

Cf. *United States* v. *Minor,* 114 U. S. 233, 243. So considered, the order is plainly not conclusive on the courts.

From the existence of a provision for judicial review when the President disallows a claim and the absence of a statutory remedy when a claim is allowed, the petitioner argues that Congress intended that an allowance should be final. No such inference may be drawn, for no statutory provision is necessary to permit the United States to sue to recover public moneys erroneously paid out. *Wisconsin Central Railroad* v. *United States,* 164 U. S. 190, 205; *United States* v. *Wurts,* 303 U. S. 414, 415. Nor does the provision of Section 9 (c) quoted by the petitioner (Brief, p. 12) lend support to its view. It seems obvious that even without an express bestowal of the power to determine facts both the President and the court would have possessed the power by implication from the power to make a decision. The petitioner also mistakes the import of the language of the proviso of Section 12. The purpose of this proviso, apparently, was to make it plain that money or property held by the Custodian or the Treasurer should be released from the directions as to administration contained in Sections 6 and 12 upon the issuance of an order by the President or by the court directing the return of the property to a claimant. The proviso is not indicative, as the petitioner urges, that Congress intended a Presidential order to be as

final and conclusive as a judicial decree in all respects.

Furthermore, even if we assume that a presidential allowance under Section 9 might be entitled to finality in some circumstances, the President's determination is not conclusive in the circumstances of this case. The only purpose for giving the presidential determination finality would be "to put the controversy at rest." Where the claimant invites reexamination of the question of the amount of the allowance, there is no reason to deny the Government the right to litigate every question relating to the original claim. The courts accordingly have permitted the Government to counterclaim for an allowance paid under mistake where the claimant, having received the allowance pursuant to a determination, sued to recover an additional sum. *McElrath* v. *United States,* 102 U. S. 426, 441; *Cummings* v. *Societe Suisse,* 85 F. (2d) 287, 99 F. (2d) 387 (App. D. C.), certiorari denied, 306 U. S. 631; *United States* v. *Rodiek,* 117 F. (2d) 588 (C. C. A. 2), affirmed by an equally divided court, 315 U. S. 783.

The Government's position in the present case is much stronger than in the *Rodiek* case and other cases cited. In those cases the court reviewing the President's allowance of a claim was required to determine for itself *ab initio* whether the President's decision was correct as a matter of law. In none was there a situation comparable to that at bar, in which the case had been resolved

by this Court prior to the President's allowance of the claim, and in which the President, acting in ignorance of the decision, permitted the return of property to a claimant who had previously been held ineligible to receive it. The facts in this case are unusual, to say the least, and they should not, and we believe will not, recur frequently in the future.

2. Petitioner urges that even if the President's allowance of its claim is not conclusive in the present circumstances, it is nevertheless entitled to keep the money because it suffered no unjust enrichment by the receipt of property equitably owned by it and to which it would ultimately be entitled. This argument can succeed only if the seizure by the Alien Property Custodian did not give the United States absolute title to the property but left an equitable interest in the original owner. Petitioner concedes that its argument requires the overruling of the cases in which this Court has repeatedly held that the title acquired by the United States was absolute. *United States* v. *Chemical Foundation,* 272 U. S. 1; *Cummings* v. *Deutsche Bank,* 300 U. S. 115; *Woodson* v. *Deutsche, etc., Vormals,* 292 U. S. 449, 454; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 56.[3]

[3] See also *Cummings* v. *Hardee*, 102 F. (2d) 622, 627 (App. D. C.), certiorari denied, 307 U. S. 637; *Munich Reinsurance Co.* v. *First Reinsurance Co.*, 300 Fed. 345 (D. Conn.), affd., 6 F. (2d) 742 (C. C. A. 2), appeal dismissed, 273 U. S.

We do not think reconsideration by this Court of its prior decisions under the Trading with the Enemy Act is called for. All property, with the exception of a few millions in value, seized during World War I has been administered and disposed of in conformance with the interpretation of the Act which has prevailed up to this time.[4]

Nor is a case involving property seized in the last war a proper vehicle for determining the status of property seized during the present war. The Secretary of the Treasury and the present Alien Property Custodian are operating primarily under Title III of the First War Powers Act, 1941, 55 Stat. 838, 839, amending Section 5 (b) of the Trading with the Enemy Act (50 U. S. C. App. Supp I, Sec. 616). See Executive Order 9193 of July 6, 1942 (7 F. R. 5205). The present Alien Property Custodian is not now seizing property of enemies or allies of enemies under Section 7 (c) of the old Trading with the Enemy Act but is "vesting" property of "foreign nationals" under Section 5 (b) as amended. The questions which will arise under the Act as amended are not

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666; *Chemische Fabrik, etc.* v. *Tait*, 64 F. (2d) 295 (C. C. A. 4), certiorari denied, 290 U. S. 648; *Deutsch-Australische, etc.* v. *United States*, 59 C. Cls. 450, appeal dismissed, 277 U. S. 610; *Balkan Nat. Ins. Co.* v. *Commissioner of Internal Revenue*, 101 F. (2d) 75, 77 (C. C. A. 2).

[4] Since the beginning of World War II the return of property seized in World War I has been held in abeyance.

identical with those raised by the older statute, and it will be time enough for this Court to determine whether such mistakes as that here involved can be rectified under the present system when, and if, they arise.

CONCLUSION

The decision below is correct. It does not conflict with, but on the contrary is supported by, the other decisions on the point. The question as raised here presents no issue important enough to warrant further review. We therefore respectfully submit that the petition should be denied.

CHARLES FAHY,
Solicitor General.
HUGH B. COX,
Assistant Attorney General.
GEORGE A. MCNULTY,
HARRY LEROY JONES,
ROBERT L. STERN,
Special Assistants to the Attorney General.
FREDERICK L. SMITH,
Attorney.

SEPTEMBER 1943.

APPENDIX

Pertinent portions of Sections 9 (a), 9 (b), and 9 (c) of the Trading with the Enemy Act, as amended (50 U. S. C. App., Sec. 9):

> (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant

to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. * * *

(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—

* * * * *

Then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian: * * * And the receipt of the said owner or of the person by whom said money or other property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian shall be a full acquittance and discharge of the Alien Property Custodian or the Treasurer of the United States, as the case may be, and of the United States in respect to all claims of all persons heretofore or hereafter claiming any right, title, or interest in said money or other property, or compensation or damages arising from the capture of such money or other property by the President or the Alien Property Custodian: *Provided further, however,* That except as herein provided no such action by the President shall bar any person from the prosecution of any suit at law or in equity to establish any right, title, or interest which he may have therein; * * *

* * * * *

(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and

thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof.

Section 29 (e) of the Trading with the Enemy Act, as added by the Act of March 10, 1928 (45 Stat. 254, 50 U. S. C. App., Sec. 29 (e)):

All money or other property received by the Alien Property Custodian as a result of any action or proceeding (whether begun before or after the enactment of the Settlement of War Claims Act of 1928, and whether or not for the enforcement of a demand or requirement as above specified) shall for the purposes of this Act be considered as forming a part of the trust in respect of which such action or proceeding was brought, and shall be subject to return in the same manner and upon the same conditions as any other money or property in such trust, except as otherwise provided in subsection (b) of this section.

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(33)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 288

SWISS NATIONAL INSURANCE COMPANY, LTD.,
a Corporation of Basle, Switzerland,
Petitioner,

against

LEO T. CROWLEY, as Alien Property Custodian, and
W. A. JULIAN, as Treasurer of the United States,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITIONER'S REPLY BRIEF

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITIONER'S REPLY BRIEF

We think it merely necessary to answer in briefest form the statement contained at page 12 of Respondents' Brief in Opposition to our Petition for Certiorari. Respondents there assert that our argument requires the overruling of *United States* v. *Chemical Foundation*, 272 U. S. 1, and the other cases there mentioned. The Government has misconceived the point of our argument, which we shall endeavor to state as succinctly as words permit.

This Court, in the cases referred to, held only that the United States had power to do what it wished with the sequestered property and that it had acquired full title. It could confiscate, or it could temporarily sequester, so

far as governmental power was concerned. What this Court held was that the former owners retained no legally enforceable rights to the property taken from them.

It is illegitimate to assume from this that there was no international law on the subject which the United States was bound to respect. Congress could violate that law and confiscate the money, but the international rule against confiscation was a well settled part of our American public law. Congress had evinced no intention of repudiating this rule and, as a matter of fact, did not repudiate it, but acknowledged, impliedly at least, the international obligation. The power of Congress to ignore an international obligation, whether treaty or customary, is not disputed, but until it does so international law must be held to exist and to be binding; it is still, as Chief Justice Marshall stated, part of our law. It has never been repudiated.

Since the United States was under a duty to return the funds taken over from petitioner in 1918, it follows that petitioner is entitled, in equity and good conscience, to retain the funds restored to it under the Presidential order of 1925, regardless of whether the President acted under a misinterpretation of the applicable law.

This is the nub of our case. Never was it more important than today to know whether international law is to be respected. Many of us thought that our great struggle and war effort were largely on behalf of the observance of that law. This case would thus seem to have its own peculiar importance and dignity.

September 23, 1943.

Respectfully submitted,

FREDERIC R. COUDERT
ALEXIS C. COUDERT
No. 2 Rector Street
New York, N. Y.
Counsel for Petitioner